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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 WILLIAM THOMAS MYERS,
12 CDCR #E-18846,

13 Plaintiff,

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15 vs.
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17 U.S. MARSHALS SERVICE,
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19
20 Defendant.
21
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Civil No. 10cv2662 JAH (JMA)

ORDER:

1) **GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN*
FORMA PAUPERIS, IMPOSING
NO PARTIAL FILING FEE AND
GARNISHING \$ 350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 4];**

AND

**(2) DISMISSING COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) & 1915A(b)**

23
24 Plaintiff, William Thomas Myers, an inmate currently incarcerated at Calipatria State
25 Prison located in Calipatria, California, has filed a civil rights action pursuant to 42 U.S.C.
26 § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant
27 to 28 U.S.C. § 1915(a) [Doc. No. 4].
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I.**MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
 2 to Proceed IFP [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
 3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
 4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 5 § 1915(b)(1).

6 **II.**

7 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

8 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 9 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
 10 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 11 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
 12 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 13 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
 14 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 15 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 16 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
 17 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 18 § 1915A).

19 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 20 allegations of material fact and must construe those facts in the light most favorable to the
 21 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 22 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 23 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
 24 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
 26 pro se civil rights complaint, the court may not “supply essential elements of claims that were
 27 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
 28

1 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations
2 are not sufficient to withstand a motion to dismiss.” *Id.*

3 **A. Bivens Action**

4 While Plaintiff filed this action pursuant to 42 U.S.C. § 1983, he names only a Federal
5 agency as a Defendant. Accordingly, the Court will consider Plaintiff’s claims to arise under
6 *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* established
7 that “compensable injury to a constitutionally protected interest [by federal officials alleged to
8 have acted under color of federal law] could be vindicated by a suit for damages invoking the
9 general federal question jurisdiction of the federal courts [pursuant to 28 U.S.C. § 1331].” *Butz*
10 *v. Economou*, 438 U.S. 478, 486 (1978). “Actions under § 1983 and those under *Bivens* are
11 identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*.”
12 *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

13 *Bivens* provides that “federal courts have the inherent authority to award damages against
14 federal officials to compensate plaintiffs for violations of their constitutional rights.” *Western*
15 *Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000). However, a *Bivens*
16 action may only be brought against the responsible federal official in his or her individual
17 capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988). *Bivens* does not
18 authorize a suit against the government or its agencies for monetary relief. *FDIC v. Meyer*, 510
19 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Daly-*
20 *Murphy*, 837 F.2d at 355. Thus, because Plaintiff names the United States Marshals Service,
21 which is an agency of the Federal Government, this Defendant must be dismissed from this
22 action.

23 **B. Access to Courts claim**

24 Plaintiff alleges that his access to the courts has been denied because the United States
25 Marshals Service (“USMS”) has failed to properly serve Defendants in a separate action that
26 Plaintiff has filed. *See Myers v. Small, et al.*, S.D. Cal. Civil Case No. 08cv1810 JAH (WMc).
27 Prisoners do “have a constitutional right to petition the government for redress of their
28 grievances, which includes a reasonable right of access to the courts.” *O’Keefe v. Van Boening*,

82 F.3d 322, 325 (9th Cir. 1996); *accord Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817, the Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons who are trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the right to access to the courts, however, a prisoner must allege facts sufficient to show that: (1) a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

Here, however, Plaintiff cannot show the required “actual injury” because his action filed as *Myers v. Small, et al.*, S.D. Cal. Civil Case No. 08cv1810 JAH (WMc) is still pending and has not been dismissed. Any issues regarding service with the USMS should be addressed in that matter rather than filing a separate action. Accordingly, the Court finds that Plaintiff has failed to allege facts sufficient to state an access to courts claim.

III.

CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is **GRANTED**.

2. The Secretary of California Department of Corrections and Rehabilitation, or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

1 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
2 ASSIGNED TO THIS ACTION.

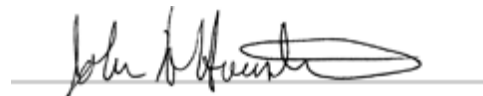
3 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
4 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
5 Sacramento, California 95814.

6 **IT IS FURTHER ORDERED** that:

7 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
8 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
9 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
10 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
11 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
12 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
13 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
14 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without
15 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).
16 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

17 **IT IS SO ORDERED.**

18 DATED: February 15, 2011

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21 JOHN A. HOUSTON
United States District Judge